FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 7 1942
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~1100~~. 66

EMIL H. STRASSBURGER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

In order fully to apprise the Court of all developments to date in the above entitled cause, we respectfully invite the attention of the Court to the case of *Dreyfuss* v. *Manning, Collector,* Fed. Supp. , District Court of New Jersey, March 24, 1942. Said decision has not yet been officially reported, but appears in the report of April 15, 1942, Commerce Clearing House, Standard Federal Tax Service, 1942, ¶9399. Particularly do we note this case since Respondent's brief makes no mention of or reference thereto. In the *Dreyfuss* case on substantially identical facts, District Judge Fake specifically adverted to the Strassburger case, but refused to follow the majority decision therein. After a thorough-going analysis of the principles of law underlying the whole question of taxability of stock dividends from *Eisner* v. *Macomber* down to date, including the *Koshland* case, the Court concluded that the true criterion depends upon whether the taxpayer's proportionate interest in the net assets had been increased. The facts showed, observed the Court, that the sole stockholder had a 100% interest before the

stock dividend and a 100% interest after the stock dividend and that no income had been realized.

> "To reason to the contrary, makes it necessary to arrive at the conclusion that the whole can be greater than the sum of its parts. Even in this advanced age, wherein thought is being tested by science and invention, no such feat as yet has been accomplished."
>
> • • •
>
> "In *Strassburger* v. *Commissioner*, 124 F. (2d) 315, the majority opinion is in direct conflict with the result arrived at here, but it should be noted that the opinion concedes that 'the question is not free from doubt.' Judge Chase, in dissenting, says 'But surely the case just mentioned (the *Koshland* case) must rest upon firmer ground than a change in the kind of shares of stock a stockholder has as the result of a dividend of stock on stock. There must also be a change in his proportionate interest in the corporation's net assets in order to have what is known as a "realization" of income.' With this dissent I find myself in full accord for the reasons above stated."

Further, the Circuit Court of Appeals in the 9th Circuit which decided the *Sprouse* case, has followed its decision in *Keister* v. *Commissioner*, Fed. (2d) , April 10, 1942, not yet reported but appearing in Commerce Clearing House, Standard Federal Tax Service, 1942, ¶9423.

Respondent opposes the granting of the petition. In effect opposing counsel say that although they thought that the entire question should be reviewed and so urged in the *Sprouse* petition, since this Court denied said petition, it ought also to deny this petition. It may well be, however, that this Court saw no reason to upset the decision in the *Sprouse* case and would not grant certiorari

until the proper case was presented. We respectfully submit, in view of the decision below and the uncertainty in the lower Courts as evidenced by the conflicting decisions, that the instant case is a proper case for review, and again we respectfully request that the petition be granted.

Respectfully submitted,

LEO BRADY,
Attorney for Petitioner.